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Civil Justice And The (Green) New Deal

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CIVIL JUSTICE AND THE (GREEN) NEW DEAL

Zachary D. Clopton*

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Proposals for a Green New Deal consciously harken back to the original New Deal. But in at least one important way, Green New Dealers have yet to follow the New Dealers’ roadmap. New Deal legislation from the Fair Labor Standards Act to the securities statutes to the Communications Act relied on civil enforcement as part of comprehensive regulatory strategies. As documented in this Essay, these New Deal statutes frequently included provisions that authorized—and at times incentivized—public and private civil enforcement of various federal rights. Despite this model, proposals for a Green New Deal have not addressed in any systematic way the role of civil enforcement. This Essay, therefore, examines how the New Deal employed civil enforcement in order to demonstrate ways for the Green New Deal to follow suit, and it offers a framework for how a Green New Deal could employ civil enforcement. This framework calls for a sensitive assessment of the institutional design of civil-enforcement regimes. And it responds to the current legal and institutional landscape—including the rise of arbitration and procedural retrenchment—with attention to public enforcement, state courts, and qui tam litigation.

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INTRODUCTION

If you search for “New Deal” and “courts” on Google, forty-nine of the first fifty results are about the Supreme Court: the Supreme Court striking down New Deal legislation; President Franklin Delano Roosevelt’s court-packing plan; and the Switch in Time.¹ The only outlier is a story about tennis courts built by the Works Progress Administration.² None of these stories is about courts enforcing New Deal legislation.

And yet, New Deal statutes included numerous provisions that relied on courts to further regulatory goals. The Fair Labor Standards Act, the Securities Act of 1933, the Securities Exchange Act of 1934, the Communications Act, the National Labor Relations Act, and others relied on civil litigation as part of comprehensive regulatory strategies.³ These statutes frequently included provisions that authorized—and at times incentivized—public and private civil enforcement of various federal rights.

Today, the “Green New Deal” is a central topic in the Democratic presidential primary (and the coverage of it).⁴ As a provocative *Washington Post* headline put it: *The Green New Deal? A Green New Deal? Whatever It Is, 2020 Democrats Support It*.⁵ Though the contours of a Green New Deal are yet to be worked out, the basic idea is to apply a New Deal-like legislative push to an agenda that brings together responses to climate change and economic issues.

1. Searching “new deal” and “courts,” GOOGLE SEARCH, <https://www.google.com/> (results on file with author).

2. See The Living New Deal, New Deal Category: Tennis Courts, <https://livingnewdeal.org/new-deal-categories/parks-and-recreation/tennis-courts>.

3. See *infra* Part I (describing these statutes and more). This is not to say that New Dealers did not, simultaneously, express a hostility to courts and a tendency to reallocate some responsibilities to administrative agencies. See generally Norman W. Spaulding, *Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture*, 85 *FORDHAM L. REV.* 2249 (2017). But as demonstrated below, the New Deal did include a substantial role for public and private enforcement. See *infra* Part II. Also, my definition of civil enforcement is broad enough to include enforcement within the administrative state. See *infra* Part I.

4. See, e.g., David Roberts, *The Green New Deal, Explained*, VOX.COM (Mar. 30, 2019), <https://www.vox.com/energy-and-environment/2018/12/21/18144138/green-new-deal-alexandria-ocasio-cortez>. See also *infra* Section III.A. For example, at the same time as the Clifford Symposium was held, CNN conducted a poll of registered democrats and democratic leaning independents. Their number one issue in the primary was taking “aggressive action to slow the effects of climate change.” See Jennifer Agiesta, *CNN Poll: Biden Solidifies Front-Runner Status with Post-Announcement Bump*, CNN.COM (Apr. 30, 2019), <https://www.cnn.com/2019/04/30/politics/cnn-poll-2020-biden-announcement-bounce/index.html>.

5. See, e.g., Chelsea Janes, *The Green New Deal? A Green New Deal? Whatever It Is, 2020 Democrats Support It*, WASH. POST (Jan. 31, 2019), https://www.washingtonpost.com/politics/the-green-new-deal-a-green-new-deal-whatever-it-is-2020-democrats-support-it/2019/01/30/a75166d4-2340-11e9-ad53-824486280311_story.html.

Like the original New Deal, the Green New Deal may have a role for courts and litigation. But unlike the original New Deal, current proposals for Green New Deal legislation have not addressed in any systematic way the role of civil justice and civil enforcement.⁶ An examination of how the New Deal employed litigation to further its goals can demonstrate ways for the Green New Deal to follow suit.

This Essay takes up that task by drawing lessons from the original New Deal and applying them to proposals for a Green New Deal. This Essay does not endorse any particular Green New Deal proposal—or any Green New Deal at all. Nor do I hold out any special optimism for immediate progress. But given the sustained attention to this suite of policy ideas, this Essay analyzes what a committed Green New Dealer might do to incorporate civil justice into their reforms. In particular, a Green New Deal could:

- Incorporate civil causes of action into statutes promoting economic or environmental justice;
- Incentivize private enforcement through provisions on liability, remedies, attorney fees, and collective actions;
- Empower state attorneys general to sue to enforce federal substantive rights;
- Insulate civil enforcement from federal procedural retrenchment by permitting claims in state courts, in administrative agencies, and by public enforcers or *qui tam* relators; and
- Protect civil enforcement from mandatory arbitration by regulating arbitration or by empowering enforcers who are not bound by arbitration agreements.⁷

None of these proposals are new, but they can be deployed here in furtherance of a new deal. This Essay explains how.

Before doing so, one important caveat is in order. This is an Essay about courts, not *the* Court.⁸ Certainly the Supreme Court was deeply connected with the New Deal, having reviewed New Deal statutes and being the subject of FDR's push for court reform. The same might be true for a Green New Deal: Whatever is adopted could be challenged in court, and "court packing" has returned to the public discourse in

6. See *infra* Section III.A.

7. See *infra* Section III.B.

8. Perhaps a second caveat is that I am focusing on the use of courts (and agencies) for purposes of civil enforcement, meaning that I am talking about claims made against private actors. Courts (and agencies) also had an important role in enforcing New Deal claims against government actors. See KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972*, 113–49 (2016). However, that is not my subject here.

the last few years.⁹ But this Essay and related Symposium are not the forums to address a new court-packing plan or the likelihood of Supreme Court intervention in a Green New Deal. Instead, this Essay considers the role of courts with respect to civil justice and civil enforcement.

With that in mind, the balance of this Essay proceeds as follows. Part I defines the contours of “civil enforcement” and the elements of a civil enforcement regime. Part II then looks back at the New Deal to understand the role of civil enforcement in New Deal legislation. Part III uses those findings to consider the role of civil enforcement in a Green New Deal. Neither the New Deal nor the Green New Deal will be remembered for their contributions to civil justice reform. But the New Deal relied on civil enforcement as a tool of public policy, and with concerted attention, the Green New Deal could do so as well.

I. CIVIL ENFORCEMENT

The focus of this Essay is a tool of public policy that I am calling “civil enforcement.” There is substantial debate about both the name of the category and its boundaries.¹⁰ But for present purposes, I can define the relevant field as the use of civil claims—by public or private actors—to enforce substantive regulatory commands contained in federal statutes or the regulations they authorize.¹¹

9. See, e.g., Michael Scherer, ‘Court Packing’ Ideas Get Attention from Democrats, WASH. POST (Mar. 11, 2019), https://www.washingtonpost.com/politics/court-packing-ideas-get-attention-from-democrats/2019/03/10/d05e549e-41c0-11e9-a0d3-1210e58a94cf_story.html?utm_term=.9d227e19e317.

10. See, e.g., STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); Rachel E. Barkow, *Foreword: Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129 (2016); Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016) [hereinafter Clopton, *Redundant Public-Private Enforcement*]; J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012); Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation States*, 102 CORNELL L. REV. 929 (2017); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011); Patrick Luff, *Risk Regulation and Regulatory Litigation*, 64 RUTGERS L. REV. 73 (2011).

11. If one intended to study enforcement more broadly, I would object to a definition limited to federal statutes. Such a definition unjustifiably excludes areas governed by federal or state common law or state statutory rights. But because this project is focused on New Deal statutes and proposed Green New Deal statutes, this limited focus is justified. Note also that this definition consciously excludes criminal law. That is consistent with much of the literature cited *supra* note 10, as well as with the theme of this symposium. Moreover, this exclusion reflects certain realities of litigation and enforcement. The rules of the game are just different for criminal and

Civil enforcement regimes of various types play a central role in American law. According to the Administrative Office of the U.S. Courts, almost 200,000 civil cases are filed every year to enforce federal statutes.¹² Civil enforcement is catholic in subject matter. Anti-trust and securities laws may be the classic areas of private enforcement,¹³ but a recent study identified enforcement provisions in federal statutes related to labor, communications, civil rights, environmental law, consumer protection, banking, energy, transportation, public health and safety, elections, national security, food and drug, and aviation.¹⁴

Two key ideas undergird civil enforcement in the American style. First, American regulation relies heavily on the *ex post* imposition of costs. As Samuel Issacharoff wrote in a previous Clifford Symposium:

What is distinctive about the United States is the extent to which we regulate not [market] entry but consequences. There is a significant difference between an unregulated market and a deregulated market featuring low entry costs but careful scrutiny after the fact. What really sets the United States apart is the fact that its basic regulatory model is *ex post* rather than *ex ante*, a form of regulation that draws heavily on its common-law tradition. It is precisely the availability of meaningful *ex post* accountability that comes to define much of the operation of the rule of law in the United States.¹⁵

This *ex post* approach means that the U.S. system needs people to press *ex post* claims and forums to adjudicate them. For better or worse, in other words, the alleged American obsession with litigation is deeply connected with our distinctive mode of regulation.¹⁶

Second, American regulation is characterized by the breadth of potential *ex post* enforcers. As Maria Glover explained:

The American approach to regulation is also extraordinary in that it entrusts *ex post* law enforcement not to a centralized state bureaucracy but rather to a diffuse set of regulators. The United States harnesses private citizens, public regulatory bodies, nongovernmen-

civil cases. See, e.g., Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 777–78 (1997).

12. See Administrative Office of United States Courts, Table C-2: U.S. District Courts—Civil Statistical Tables for the Federal Judiciary (June 30, 2018), <https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2018/03/31>.

13. See Clopton, *Redundant Public-Private Enforcement*, *supra* note 10, at 296–97 (collecting sources).

14. Burbank et al., *supra* note 10, at 685–86.

15. Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377 (2007). See also Glover, *supra* note 10, at 1145–46.

16. See, e.g., ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 279 (Henry Reeve trans., 1839) (“Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”).

tal organizations, and private market agents to regulate social harm.¹⁷

Federal statutes such as those described in this Essay routinely rely on a mix of public and private actors to enforce their substantive commands and thus to deter noncompliance in the first instance. Therefore, the alleged American obsession with private lawyers is also connected with our distinctive array of enforcers.

The institutional design of civil enforcement begins with the cause of action. By definition, a civil enforcement regime begins with a civil cause of action. The enforcement literature emphasizes private rights of action (and “private enforcement”),¹⁸ but public rights of action (and “public enforcement”) are civil enforcement too.¹⁹ And, as I have documented at length elsewhere, many civil enforcement regimes authorize both private and public suits, what I called “redundant enforcement.”²⁰ For the most part, this Essay is concerned with express rights of action, though American law also has been known to countenance implied rights of action in certain circumstances.²¹

In addition to doling out causes of action, enforcement statutes can specify various features of the enforcement regime. An enforcement statute might further specify which actor or actors can sue: any person, any person harmed, the federal government, the states, municipalities, foreign governments, or a combination of these categories.²² An enforcement statute also might specify where the suits might take place, relying on provisions addressing jurisdiction, venue, or service of process.²³ When multiple suits are possible, an enforcement statute might specify how suits relate to one another, including rules on preclusion, damages, order, timing, joinder, and prerequisites to suit.²⁴

17. Glover, *supra* note 10, at 1145.

18. See, e.g., Burbank et al., *supra* note 10, at 661.

19. See, e.g., Zachary D. Clopton, *Class Actions and Executive Power*, 92 N.Y.U. L. REV. 878, 888 (2017) [hereinafter Clopton, *Class Actions and Executive Power*]; Lemos, *State Enforcement*, *supra* note 10, at 700.

20. Clopton, *Redundant Public-Private Enforcement*, *supra* note 10, at 298. See also Adam S. Zimmerman, *Mass Settlement Rivalries*, 82 U. CIN. L. REV. 381, 382–85 (2013); Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 MINN. L. REV. (2019).

21. See, e.g., *Cort v. Ash*, 422 U.S. 66, 83–84 (1975); *Cannon v. U. of Chi.*, 441 U.S. 677, 717 (1979); *Alexander v. Sandoval*, 532 U.S. 275, 291–93 (2001); Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 6 (2014).

22. See, e.g., Lemos, *State Enforcement*, *supra* note 10, at 704; Clopton, *Redundant Public-Private Enforcement*, *supra* note 10, at 329 (collecting examples); Zachary D. Clopton, *Diagonal Public Enforcement*, 70 STAN. L. REV. 1077, 1087 (2018) [hereinafter Clopton, *Diagonal Public Enforcement*] (discussing foreign sovereigns enforcing federal statutes).

23. See, e.g., 15 U.S.C. § 78aa (2012) (providing for exclusive federal jurisdiction in any federal court for claims under the Securities and Exchange Act of 1934).

24. See generally Clopton, *Redundant Public-Private Enforcement*, *supra* note 10 (discussing and providing examples).

In order to stimulate enforcement, legislatures also can introduce incentives to sue.²⁵ Incentives may take the form of provisions on attorney fees, statutory damages, or damage enhancements. Or, more indirectly, incentives may take the form of provisions on aggregation that function as subsidies for individual litigation.²⁶ Particularly when relying on private parties, these incentives may be necessary to achieve the promise of civil enforcement.²⁷

Finally, a word should be said about the institutional determinants of civil enforcement. In his pathmarking work on private enforcement, Sean Farhang explained that legislatures tend to turn to private enforcement when they do not want to rely exclusively on public enforcement.²⁸ This may arise when a pro-regulatory legislature (think Democrats) faces an anti-regulatory executive (think Republicans).²⁹ Farhang also suggested that the ideology of the judiciary might affect legislators' preferences for court-based remedies, despite the fact that he found evidence of legislators turning to private enforcement when courts were friendly and when courts were hostile.³⁰

Though Farhang seeks to explain legislative preferences for private enforcement, nothing in his work suggests that private enforcement is only possible given certain political configurations. Moreover, if we broadened the inquiry to include all potential enforcers (public and private, federal and state)³¹ and all potential forums (federal courts,

25. See generally Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782 (2011); FARHANG, *supra* note 10; BURBANK & FARHANG, *supra* note 10.

26. Resnick, *supra* note 25; Lemos, *supra* note 25; FARHANG, *supra* note 25; BURBANK & FARHANG, *supra* note 10.

27. Resnick, *supra* note 25; Lemos, *supra* note 25; FARHANG, *supra* note 25; BURBANK & FARHANG, *supra* note 10. Burbank and colleagues, for example, identify seven benefits of private enforcement:

[P]rivate enforcement regimes can: (1) multiply resources devoted to prosecuting enforcement actions; (2) shift the costs of regulation off of governmental budgets and onto the private sector; (3) take advantage of private information to detect violations; (4) encourage legal and policy innovation; (5) emit a clear and consistent signal that violations will be prosecuted, providing insurance against the risk that a system of administrative implementation will be subverted; (6) limit the need for direct and visible intervention by the bureaucracy in the economy and society; and (7) facilitate participatory and democratic governance.

Burbank et al., *supra* note 10, at 662.

28. See generally FARHANG, *supra* note 10.

29. *Id.*

30. *Id.* at 223–24 (summarizing findings on judicial ideology).

31. See Clopton, *Redundant Public-Private Enforcement*, *supra* note 10, at 298 (collecting sources on redundant enforcement). See also Zimmerman, *supra* note 20, at 382–85; Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411, 445–46 (2018) [hereinaf-

state courts, and administrative agencies),³² then it would appear that civil enforcement could be a sensible part of a regulatory program regardless of which party controls which branch. But, of course, we should expect policy makers to be cognizant of institutional dynamics when crafting new enforcement regimes.

II. THE NEW DEAL

When he accepted his party's nomination for President, Franklin Roosevelt offered to give the United States a "new deal."³³ The press responded well to the term, so he kept using it.³⁴ For the next century, the term remained politically popular as either a success to be emulated or a disaster to be avoided.³⁵

The boundaries of the New Deal are contested, but most would agree that it—at least—encompasses the Roosevelt administration's efforts related to the economic conditions in the United States in the 1930s.³⁶ There is also no consensus about what counts as New Deal legislation. For purposes of this Essay, I began with the helpful appendix to Eric Rauchway's *Great Depression and the New Deal: A Very Short Introduction*,³⁷ and then supplemented his list from other sources. In total, I collected forty-four statutes and executive orders that at least arguably fall within the New Deal.³⁸

Though not an innovation of the New Deal,³⁹ civil enforcement played a role in a number of New Deal statutes. Many New Deal stat-

ter Clopton, *Procedural Retrenchment and the States*]. See generally Lemos, *State Enforcement*, *supra* note 10.

32. See generally, e.g., Clopton, *Class Actions and Executive Power*, *supra* note 19, at 891–92; Clopton, *Procedural Retrenchment and the States*, *supra* note 31.

33. See Franklin Delano Roosevelt, *Acceptance Speech at the Democratic Convention*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBRARY & MUSEUM, NATIONAL ARCHIVES (July 2, 1932), <https://fdrlibrary.org/dnc-curriculum-hub>.

34. ERIC RAUCHWAY, *GREAT DEPRESSION AND THE NEW DEAL: A VERY SHORT INTRODUCTION* 56 (2008).

35. ANTHONY J. BADGER, *THE NEW DEAL* 2 (1989) (“[Historians] have often appeared to be trapped in a cycle of lamentation or celebration of the New Deal: they have spent more time denigrating or championing it than explaining it.”).

36. See RAUCHWAY, *supra* note 34, at 3–4.

37. *Id.* at tbl.1.

38. The full list of statutes is on file with author.

39. See, e.g., 15 U.S.C. § 15 (2008) (Sherman Act right of action).

utes included provisions for public and/or private civil enforcement,⁴⁰ and courts found implied rights of action in others.⁴¹

One key example of New Deal civil enforcement is the Fair Labor Standards Act of 1938 (FLSA).⁴² The FLSA is the major federal statute addressing minimum wage, maximum hours, and child labor. It does so in part through private enforcement. Section 16(b) of the original FLSA provided for a private right of action to enforce the statute's provisions.⁴³ The FLSA facilitated and incentivized private suits by providing for jurisdiction in any court, double damages, one-way fee shifting, and a mechanism for representative litigation without requiring opt in—the last of which was particularly noteworthy given that the 1966 amendments to Federal Rule 23 were decades away.⁴⁴ Private enforcement under today's FLSA is weaker, as the Portal to Portal Act of 1947 added (among others) a written opt-in requirement for representative suits.⁴⁵

Civil enforcement was also central to the New Deal securities laws.⁴⁶ The Securities Act of 1933 and the Securities Exchange Act of

40. See, e.g., Emergency Banking Relief Act, ch. 1, 48 Stat. 1 (1933); United States Housing Act of 1937, ch. 896, 50 Stat. 888; Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933) (codified as amended at 7 U.S.C.A. § 601 (2008)); Banking Act of 1935, ch. 614, 49 Stat. 684 (codified as amended at 12 U.S.C.A. § 228 (2012)); Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)); Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. § 201 (2012)); Communications Act of 1934, ch. 651, 48 Stat. 1064; Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a (2008)); National Labor Relations Act, 49 Stat. 449 (codified as amended at 29 U.S.C.A. § 151 (2012)); Public Utility Holding Company Act, ch. 687, 49 Stat. 803 (1935) (codified as amended at 15 U.S.C.A. § 79a (2008)).

41. See, e.g., *N.Y. Stock Exch. v. Bloom*, 562 F.2d 736, 742 (D.C. Cir. 1977) (discussing Glass-Steagall Act, 47 Stat. 56); Evelyn Honigberg, *The Enforcement of Minimum Wage Provisions Under NIRA*, 20 WASH. UNIV. L. REV. 73, 79 (1934) (discussing National Industrial Recovery Act, 48 Stat. 195).

42. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201 *et seq.* (2012)). See also Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 642–43 (2019); Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AMER. POL. DEV. 1, 16, 21 (2005); John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L. & CONTEMP. PROBS. 464, 473 (1939).

43. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201 *et seq.* (2012)).

44. *Id.* Note that none of the sources cited above, nor the legislative history, indicated that the private enforcement provisions were at all controversial in the first bill.

45. 61 Stat. 84 (codified *inter alia* at 29 U.S.C. § 216 (2012)). See, e.g., Farhang & Katznelson, *supra* note 42, at 16, 18. These changes were inspired, in part, by lawsuits approved of in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Hugo Black, principal drafter of the FLSA, was in the majority in *Mt. Clemens*.

46. Professor Spaulding cites the 1934 Act as an example of “antiadversarialism” because, although the statute included rights of action, “judicial enforcement was tertiary to disclosure and the agency’s policy-based rulemaking.” See Spaulding, *supra* note 3, at 2253. One can quib-

1934 included provisions for private enforcement as well as for agency enforcement—i.e., redundant enforcement.⁴⁷ Redundant enforcement of the securities laws served the dual goals of compensation and deterrence,⁴⁸ or as one proponent said:

The principle of civil liability for the damage . . . [is] not only a matter of justice to the person injured but is also the surest way of guaranteeing that there will be some compliance with the section. In other words, there is no policeman so effective as the one whose pocketbook is affected by the degree to which he enforces the law.⁴⁹

But because legislators also worried about the possibility of “strike suits”—and perhaps because they imagined a different class of plaintiff in securities cases versus FLSA ones—the drafters of the ’34 Act applied two-way fee shifting to some claims under both statutes.⁵⁰

The Communications Act of 1934 took yet another approach to civil enforcement.⁵¹ The Act included provisions for both public and private enforcement,⁵² and it established concurrent jurisdiction for certain complaints in the district courts and in an administrative agency (the Federal Communications Commission (FCC)).⁵³ The FCC had a duty to receive and investigate private complaints, and the Act included a provision allowing private parties to intervene in public enforcement actions.⁵⁴ Presaging the difficulties posed by modern standing law, the statute also provided that “[n]o complaint shall at any time be dismissed [by the FCC] because of the absence of direct damage to the complainant.”⁵⁵ Other provisions addressed deemed li-

ble with the degree of importance assigned to enforcement in these statutes, but even as written, Spaulding’s characterization is consistent with the arguments of this essay: civil enforcement might be tertiary, but it is there, and the securities acts would not be the same without it.

47. See, e.g., Securities Act of 1933, ch. 38, 48 Stat. 74, 82–87; Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, §§ 9(e), 16(b), 20.

48. See Clopton, *Redundant Public-Private Enforcement*, *supra* note 10, at 303.

49. *Stock Exchange Practices: Hearings on S. Res. 84 and S. Res. 56 and S. Res. 97 before the Comm. on Banking and Currency*, 73d Cong. 6518–19 (1934) (statement of Thomas G. Corcoran, counsel with the Reconstruction Finance Corporation). See also S. REP. NO. 73-792, at 6 (1934) (“In addition to the discretionary and elastic powers conferred on the administrative authority, effective regulation must include several clear statutory provisions reinforced by penal and civil sanctions, aimed at those manipulative and deceptive practices which have been demonstrated to fulfill no useful function.”).

50. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, §§ 9(e), 18(a), 20(e). There was also significant attention during the drafting of both acts on issues such as the scope of liability, the problems of proof, and the burden of proof. See, e.g., H.R. REP. NO. 73-85 (1933); SEN. REP. NO. 73-47 (1933); SEN. REP. NO. 73-792 (1934).

51. Communications Act of 1934, ch. 652, 48 Stat. 1064, §§ 206, 401.

52. *Id.*

53. *Id.* § 207. Administrative procedures were specified in §§ 409-416.

54. *Id.* § 208.

55. *Id.* See *infra* Part II.B (discussing standing).

ability for common carriers, service of process, venue, and FCC collaboration with state-level commissions.⁵⁶

The enforcement provisions in the FLSA, the securities laws, and the Communications Act share many of the hallmarks of the prototypical private enforcement statutes studied by Farhang and others. Yet note the institutional context. While Farhang may be right that an anti-regulatory executive creates incentives for private enforcement legislation, the New Deal Congress turned to private enforcement despite a pro-regulatory executive.⁵⁷ Although a feature of private enforcement is that it shifts enforcement costs off the government's books, these private-enforcement regimes were adopted in an era when government spending was applauded.⁵⁸ And despite some hostility to government intervention among the federal courts, the New Deal Congress relied on courts to adjudicate enforcement claims.⁵⁹

That said, and perhaps motivated in part by institutional considerations, New Dealers located substantial enforcement authority in administrative agencies.⁶⁰ This included not only public rights of action but also numerous provisions providing for administrative adjudication of enforcement claims⁶¹—remember, “enforcement” does not always mean “courts.”⁶² For example, the National Labor Relations Act empowered the National Labor Relations Board (NLRB) to bring unfair labor claims and gave it exclusive jurisdiction to review them.⁶³ As

56. Communications Act of 1934, ch. 652, 48 Stat. 1064, §§ 217 (deemed liability of common carrier for acts of employee or agents), 413 (designation of agent for service), 505 (venue), 401(b) (collaboration with state commissions).

57. Cf. FARHANG, *supra* note 10 at 24–25.

58. Cf. Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 827, 835 (2008) (discussing but dismissing the “budget constraint hypothesis” for private enforcement). See also Gary M. Anderson & Robert D. Tollison, *Congressional Influence and Patterns of New Deal Spending*, 34 J. L. & ECON. 161, 161–62 (1991) (noting that federal spending, less military spending, more than tripled between 1927 and 1936).

59. Cf. Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in CIVIL PROCEDURE STORIES (Kevin M. Clermont ed., 2d ed. 2008). Indeed, concerns about federal common law might encourage legislators to codify enforcement-type claims in order to constrain federal judges. This explanation would be consistent with Farhang’s “judicial hostility” story. See FARHANG, *supra* note 10, at 205–06.

60. Again, this is distinct from the highly important use of administrative agencies (and courts) to adjudicate cases against the government. See TANI, *supra* note 8, at 113–49.

61. See, e.g., Communications Act of 1934, ch. 652, 48 Stat. 1064, § 1; Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, 885, 899, 901; National Labor Relations Act, ch. 372, 49 Stat. 449, 451, 453 (1935); Agricultural Adjustment Act, ch. 25, 48 Stat. 31, 37–38 (1933); Public Utility Act of 1935, ch. 687, 49 Stat. 803, 831.

62. See *supra* note 3 (discussing Spaulding).

63. National Labor Relations Act, ch. 372, 49 Stat. 449, 453 (1935). See H.R. REP. NO. 74-969, at 21 (1935) (“The procedure provided is analogous to that in the Federal Trade Commission (sec. 5) and is familiar to all students of administrative law.”). Reflecting a sensitivity to the

mentioned above, the FCC was an option for complainants under the Communications Act.⁶⁴ One seeming limitation on such adjudications is Article III's reservation of the "judicial power of the United States" to the judiciary.⁶⁵ But in *Crowell v. Benson*, the Supreme Court upheld, against an Article III challenge, the administrative adjudication of claims under the Longshore and Harbor Workers' Compensation Act.⁶⁶ Although "judicial power" doctrine has evolved over the years, administrative adjudication remains a viable option for civil enforcement today.⁶⁷

Finally, I should mention a statute that is well known to those interested in civil justice, but not included on my list. The Rules Enabling Act of 1934 (REA), though passed during the New Deal, is not truly a "New Deal statute."⁶⁸ As Stephen Burbank's magisterial history makes clear, the REA was the culmination of a multi-decade effort, with most of the heavy lifting occurring before the 1930s.⁶⁹ Indeed, Burbank called 1931-1933 the "lean years," and he referred to the 1934 debate as "perfunctory."⁷⁰ Rather than thinking about the REA as a product of the New Deal, Burbank remarked in a footnote that the REA's uncontroversial passage might be explained by "Congress's preoccupation with the economic and social problems of the Depres-

design of public enforcement, the NLRA shifted enforcement authority from the Justice Department to the NLRB. Compare National Labor Relations Act, ch. 372, 49 Stat. 449, 451, 453 (1935), with National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). See also H.R. REP. NO. 74-969, at 4 (1935) ("The stark fact is that after 2 years of section 7(a) the Government has succeeded in getting in the courts only 4 cases for enforcement, 2 being proceedings in equity and 2 criminal proceedings; and only 1 of these cases (the Weirton case) has come to trial. While in the public mind the National Labor Relations Board is probably regarded as responsible for the enforcement of section 7(a), the complete control of litigation is vested in the Department of Justice and its various United States attorneys throughout the country."); 74 CONG. REC. 9668,9715 (1935) ("So we had a law without teeth. A law for the benefit of labor minus the enforcement machinery.").

64. See *supra* note 52 and accompanying text.

65. See U.S. CONST. art. III.

66. 285 U.S. 22, 40-41 (1932).

67. See, e.g., Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1445-46 (2018) [hereinafter Clopton, *Justiciability, Federalism, and the Administrative State*] (collecting sources). More generally, it is notable that despite substantial New Deal fights about the judicial power and about delegations to private parties, there was little consternation about private civil enforcement. Cf. Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State, Part I: Political Accommodation and Legal Strategy in the New Deal Era* (Feb. 15, 2019), at 4-5 (discussing those other fights), Northwestern Public Law Research Paper No. 19-03, <https://ssrn.com/abstract=3335114>.

68. Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1934)).

69. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

70. *Id.* at 1094-98.

sion.”⁷¹ In other words, the New Deal may have been cover for the REA, not a driver of it.

III. THE GREEN NEW DEAL

A. *Green New Deals*

Following the 2018 elections, columnist Thomas Friedman suggested that we should “let a hundred Green New Deals ideas bloom.”⁷² Though I have not been able to count a hundred, Friedman is correct that numerous proposals have claimed the label “Green New Deal.” Surveying all of these Green New Deals is beyond the scope of this project, but for our purposes, reviewing efforts in Congress is sufficient to understand the general thrust of a Green New Deal.

The Green New Deal’s first major endorsement in Congress was a proposal for a House Select Committee.⁷³ The proposal calls for “a detailed national, industrial, economic mobilization plan . . . for the transition of the United States economy to become greenhouse gas emissions neutral and to significantly draw down greenhouse gases from the atmosphere and oceans and to promote economic and environmental justice and equality.”⁷⁴ In addition to this emphasis on climate change, the proposal also identifies goals related to economic justice and development.⁷⁵

Next came a more fully developed House Resolution on a Green New Deal.⁷⁶ The proposed resolution also brings together proposals related to climate change and economic mobilization.⁷⁷ The proposal begins with five overarching goals:

71. *Id.* at 1100 n.386. Indeed, this footnote is the only mention of the Depression in Burbank’s article. The “New Deal” is not mentioned at all.

72. See Thomas L. Friedman, *The Green New Deal Rises Again*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/opinion/green-new-deal.html>. Indeed, Thomas Friedman gives himself credit for calling for a Green New Deal in 2007. *Id.* (referring to Thomas L. Friedman, *A Warning from the Garden*, N.Y. TIMES (Jan. 19, 2007), <https://www.nytimes.com/2007/01/19/opinion/19friedman.html?mtrref=www.bing.com&gwh=1A8CB9806E8B3793BF0C2FD185403C53&gwt=pay&assetType=REGIWALL>). For more on global climate change, see generally Intergovernmental Panel on Climate Change Special Working Groups, *Global Warming of 1.5° C* (2018), <https://www.ipcc.ch/sr15>.

73. Draft Text for Proposed Addendum to House Rules for 116th Congress of the United States [hereinafter Draft Text], https://www.nakedcapitalism.com/wp-content/uploads/2019/01/AOC_Green_New_Deal.pdf.

74. *Id.*

75. *Id.*

76. H. R. RES. 109, 116th Cong. (2019) (recognizing the duty of the Federal Government to create a Green New Deal).

77. *Id.*

(A) to achieve net-zero greenhouse gas emissions through a fair and just transition for all communities and workers;

(B) to create millions of good, high-wage jobs and ensure prosperity and economic security for all people of the United States;

(C) to invest in the infrastructure and industry of the United States to sustainably meet the challenges of the 21st century;

(D) to secure for all people of the United States for generations to come—(i) clean air and water; (ii) climate and community resiliency; (iii) healthy food; (iv) access to nature; and (v) a sustainable environment; and

(E) to promote justice and equity by stopping current, preventing future, and repairing historic oppression of indigenous communities, communities of color, migrant communities, deindustrialized communities, depopulated rural communities, the poor, low-income workers, women, the elderly, the unhoused, people with disabilities, and youth⁷⁸

The resolution then elaborates on these five goals with at least twenty-nine additional goals that would implement a Green New Deal.⁷⁹

Notably, the proposal for a Select Committee and the House Resolution have little to say about courts or enforcement. Although their goals cohere with civil enforcement,⁸⁰ these documents call for neither any specific role for civil enforcement nor any specific institutional design of that enforcement regime. Green New Deals proposed by activists also rarely discuss coherent roles for civil enforcement.⁸¹

But the lack of attention on civil enforcement does not mean it has no place in a Green New Deal. Indeed, as the next Section demonstrates, civil enforcement can fit in the Green New Deal much as it did in the original New Deal.

78. *Id.*

79. *Id.*

80. For example, the House Resolution lists among its sub-goals “strengthening and enforcing labor, workplace health and safety, antidiscrimination, and wage and hour standards across all employers, industries, and sectors,” as well as “ensuring a commercial environment where every businessperson is free from unfair competition and domination by domestic or international monopolies.” *Id.* And the Select Committee proposal calls for “strong enforcement of labor, workplace safety, and wage standards that recognize the rights of workers to organize and unionize free of coercion, intimidation, and harassment, and creation of meaningful, quality, career employment.” Draft Text, *supra* note 73.

81. One possible exception is Data for Progress’s Green New Deal, which includes a few items that sound in civil enforcement. For example, their report supports efforts to “[i]mplement and enforce a bolstered Lead and Copper Rule, while letting citizens more easily sue for relief from contaminated water.” Policy Report by Data for Progress, *A Green New Deal: A Progressive Vision for Environmental Sustainability and Economic Stability* 10 (Sept. 2018), <https://www.dataforprogress.org/green-new-deal>.

B. Civil Enforcement and the Green New Deal

Like the New Deal before it, a Green New Deal could incorporate civil enforcement even if those provisions are not its most notable achievement. This Section illustrates what that might look like.

1. Causes of Action

The first question is where enforcement might fit—that is, where could Green New Dealers insert public and/or private causes of action. As noted above, the Green New Deal can be divided into two substantive areas: economic justice and environmental justice. Civil enforcement can be employed along both tracks.⁸²

With respect to economic justice, some aspects of the House Resolution call for civil enforcement. The desire to oppose “unfair competition and domination by domestic or international monopolies” implicates antitrust law, perhaps the earliest and most important example of private enforcement in U.S. law.⁸³ The call for “strengthening and enforcing labor, workplace health and safety, antidiscrimination, and wage and hour standards” implicates existing laws in these areas that include civil enforcement provisions.⁸⁴

With respect to environmental justice, civil enforcement is already part of the regulatory landscape. One notable development since the New Deal is the rise of the environmental “citizen suit,” through which virtually every federal environmental statute permits private enforcement by “any citizen.”⁸⁵ A Green New Deal could build on these statutes, as applied to various types of environmental claims. With respect to climate in particular, although many believe that climate change is an uneasy fit with litigation, there is a role for civil enforcement. The Clean Air Act (CAA) could accommodate climate-related citizen suits if the Environmental Protection Agency (EPA) regulated greenhouse gases as pollutants⁸⁶—which is exactly what the

82. Even where state or common-law claims already exist, federal codification allows Congress to specify additional incentives for enforcement. *See infra* notes 87–91. This was one justification offered for codifying anti-monopoly provisions in the late 19th century. *See FARHANG, supra* note 10, at 66–68.

83. *Compare* H. R. RES. 109(4)(N), 116th Cong. (2019), *with* 15 U.S.C. § 15 (2008) (Sherman Act right of action).

84. *Compare* H. R. RES. 109(4)(J), 116th Cong. (2019), *with* 29 U.S.C. § 216(b) (2012) (FLSA right of action); 29 U.S.C. § 626 (2009) (ADEA right of action); 42 U.S.C. § 2000e-5 (2009) (Title VII right of action).

85. *See generally* Barton H. Thompson, Jr., *The Continuing Innovations of Citizen Enforcement*, 2000 U. ILL. L. REV. 185 (2000).

86. *See* 42 U.S.C. § 7604 (1990) (citizen-suit provision).

plaintiffs asked for in the case that became *Massachusetts v. EPA*.⁸⁷ Moreover, even under current law, there are scores of civil lawsuits seeking climate-related remedies.⁸⁸

2. Enforcement Design

Having identified potential areas for civil enforcement in a Green New Deal, the second issue is how to ensure that enforcement happens. As the New Deal statutes suggest, one way to do this is to authorize *private* enforcement—which is especially important if the federal executive is not motivated to rigorously enforce statutory mandates.⁸⁹ Those authorizations also could be paired with incentives to sue. For example, a Green New Deal could follow the original FLSA and incentivize private enforcement through provisions on damages, attorney fees, and collective action.⁹⁰ And given recent developments in employment law,⁹¹ Green New Dealers also might look to the Communication Act's deemed-liability provision as a way to ensure that employers cannot avoid liability by delegating discretion to local managers.⁹² Though this is not the forum to work out the context-specific details of every possible enforcement regime in a Green New Deal, the point is that legislators should think hard about when and how to deploy incentives to sue.⁹³

This emphasis on private enforcement should not obscure the need for robust public enforcement as well. Public enforcement of federal law could come from federal actors or the states. The Communications Act, for example, empowered federal enforcement and authorized the FCC to coordinate with state commissions.⁹⁴ The last few

87. 549 U.S. 497, 516–17 (2007).

88. For an extraordinarily helpful collection of cases, see CLIMATE CHANGE LITIGATION DATABASES, <http://climatecasechart.com> (last visited Nov. 18, 2019). For example, recent climate-change lawsuits under nuisance law—often brought by states and municipalities—suggest that civil litigation could be a useful deterrent as well as a source of compensation for recovery and resilience. See *id.*

89. This was a key insight of FARHANG, *supra* note 10, at 26.

90. See *supra* notes 43–46 and accompanying text.

91. See *Wal-Mart v. Dukes*, 564 U.S. 338, 345 (2011) (“[Plaintiffs] claim that their local managers’ discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. And, [plaintiffs] say, because Wal-Mart is aware of this effect, its refusal to cabin its managers’ authority amounts to disparate treatment.”) (internal citations omitted).

92. Communications Act of 1934, ch. 652, 48 Stat. 1064, § 217.

93. Whistleblower protections are yet another tool in the private-enforcement toolbox available to Green New Dealers. See generally David F. Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES IN LAW 605 (2014).

94. Communications Act of 1934, ch. 652, 48 Stat. 1064, § 220(i)–(j).

decades have seen a rise in the power and capacity of state attorneys general.⁹⁵ Federal statutes today frequently call upon state attorneys general to enforce federal laws.⁹⁶ Empowering states further ensures that enforcement is not dependent on the particular preferences of the White House.⁹⁷ Again, legislators should think clearly about when to involve public (or redundant) enforcement and about how to structure the relationships among public and private enforcers.⁹⁸ And, again, this will depend on the particular institutional environment and the goals of the relevant substantive law.⁹⁹

3. *Institutional Challenges*

The New Deal analogy has been useful in thinking about where and how civil enforcement can play a role in the Green New Deal, but there have been changes in the institutional environment since the 1930s that are relevant here. In particular, the federal courts present a series of new challenges to civil enforcement. Green New Dealers thus must reckon with at least three legal developments: (1) modern standing doctrine; (2) federal procedural hostility to private enforcement and aggregation; and (3) the rise of arbitration.¹⁰⁰

First, while New Dealers needed to account for Article III's protection of the judicial power, a different aspect of Article III is salient today. Modern standing doctrine, grounded in Article III, requires that a plaintiff show an injury in fact, traceability, and redressability.¹⁰¹ Particularly in private-enforcement cases, the Supreme Court has made it more difficult for plaintiffs to establish standing.¹⁰² And for aggregate cases, some have called for extending the standing

95. See Lemos, *State Enforcement*, *supra* note 10, at 712.

96. See *id.* at 497–98 n.46, n.47 (collecting statutes and theorizing state enforcement of federal law).

97. As Professor Lemos explained, “[t]he most common argument” in favor state enforcement of federal law “is a need to enhance enforcement.” *Id.* at 712, 717–19.

98. For example, to avoid cutting out interested citizens, the Communications Act authorized private parties to intervene in public-enforcement actions. Communications Act of 1934, ch. 652, 48 Stat. 1064, § 411. For more on these issues, see Clopton, *Redundant Public-Private Enforcement*, *supra* note 10; David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 653 (2013).

99. This, too, is a lesson of the New Deal. See *supra* Part II.

100. I take up these issues and more in Clopton, *Procedural Retrenchment and the States*, *supra* note 31, at 416, 418–21, 423.

101. See, e.g., *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992).

102. See, e.g., Clopton, *Justiciability, Federalism, and the Administrative State*, *supra* note 67. Standing has been particularly troublesome for environmental (and climate-change) plaintiffs. See, e.g., *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139–40 (9th Cir. 2013).

requirement to every class member.¹⁰³ Importantly, because standing is a constitutional limit, Congress cannot just legislate it away.¹⁰⁴

How, then, might Congress insulate civil enforcement regimes from narrow standing doctrine and hostile federal courts? For one thing, Article III standing applies only in federal courts, so Congress might permit enforcement claims to be brought in state courts or administrative adjudications that apply more lenient standing rules.¹⁰⁵ New Deal statutes included such options. Indeed, as noted above, the Communications Act of 1934 not only provided for administrative adjudication but also specified that the lack of a “direct injury” should not defeat a claim.¹⁰⁶ Alternatively, federal courts recently have been more generous in granting government actors standing,¹⁰⁷ so a Green New Deal could empower federal agencies or state attorneys general to sue.¹⁰⁸ Furthermore, when private citizens stand in the shoes of the government in a *qui tam* suit, standing may be more easily achieved—in an opinion by Justice Scalia, the Supreme Court concluded that *qui tam* relators could establish standing even without a personal injury.¹⁰⁹ California adopted a *qui tam*-like structure to enforce labor laws,¹¹⁰ and Green New Dealers might do the same for new environmental or economic claims in order to minimize standing problems.¹¹¹

103. See generally Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, pt. 3 (2017); Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be—Part I: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 727–30 (1995).

104. As the Supreme Court said in *Spokeo v. Robins*, “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” 136 S. Ct. 1540, 1547–48 (2016) (quoting *Raines v. Byrd*, 521 U. S. 811, 820 n.3 (1997)) (internal quotation marks omitted).

105. See Clopton, *Justiciability, Federalism, and the Administrative State*, *supra* note 67. Of course, the effectiveness of state-court enforcement will depend on who serves in those courts, which implicates other challenges for progressive action. See generally Symposium, *Twenty-Third Annual Clifford Symposium on Tort Law and Social Policy: The Impact of Dark Money on Judicial Elections and Judicial Behavior*, 67 DEPAUL L. REV. 169 (2018).

106. Communications Act of 1934, ch. 652, 48 Stat. 1064, § 208.

107. See, e.g., Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1085 (2015).

108. See, e.g., Lemos, *State Enforcement*, *supra* note 10, at 708, 710; Clopton, *Procedural Retrenchment and the States*, *supra* note 31, at 446.

109. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773, 777–78 (2000). See generally Engstrom, *supra* note 93.

110. CAL. LAB. CODE §§ 2698–2699.5 (West 2017) (“PAGA”). See generally Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 U. MICH. J.L. REFORM 1203, 1225–26 (2013) (discussing PAGA). For more on state *qui tam* statutes in this volume, see Andrew Elmore, *State Qui Tam Statutes to Enforce Employment Law after Epic Systems*, 169 DEPAUL L. REV. (forthcoming 2020).

111. See Alexander, *supra* note 110; Clopton, *Procedural Retrenchment and the States*, *supra* note 31, at 414. More exotically, if the Green New Deal resulted in the adoption of a carbon tax, civil enforcement could have a role if the tax was paired with proposals for a “tax *qui tam*”

Second, critics have noted a growing hostility to private enforcement in federal procedure.¹¹² In particular, Professors Burbank and Farhang's extensive study of procedural retrenchment found that the Supreme Court in its judicial capacity has been the most effective body at checking private-enforcement litigation.¹¹³

In response, Congress might statutorily intervene in procedure—as the original FLSA did with proto-class actions.¹¹⁴ Or, because most of the Supreme Court's procedural decisions have been limited to federal courts, Congress could turn to administrative agencies or state courts.¹¹⁵ With respect to state courts, the Green New Deal would have to reckon with the Class Action Fairness Act (CAFA), which made it much easier for defendants to remove private-enforcement cases to federal court.¹¹⁶ In response, a Green New Deal could include amendments to CAFA, or modeled on the Federal Employers Liability Act (FELA),¹¹⁷ it could include a bar on removal such that a plaintiff who preferred state court could not be involuntarily moved into a federal court (applying federal procedure).¹¹⁸ More generally, Congress must keep potentially hostile courts in mind. Like a meticulous contract writer who knows all ambiguities will be resolved against the drafter,¹¹⁹ legislators must be mindful of the ways a statute may be interpreted and of the eventualities that a statute may be called upon to govern.¹²⁰

action. See, e.g., Franziska Hertel, Note, *Qui Tam for Tax?: Lessons from the States*, 113 COLUM. L. REV. 1897, 1901 (2013).

112. The list of critics is long. To cite just a few examples, see Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 153 (2011); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 201 (2010); Glover, *supra* note 10.

113. See generally BURBANK & FARHANG, *supra* note 10.

114. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, § 16(b).

115. See Clopton, *Procedural Retrenchment and the States*, *supra* note 31. For New Deal examples, see *infra* Part II. This is consistent with Spaulding's description of New Dealers disempowering courts in favor of administrative agencies. See Spaulding, *supra* note 3.

116. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 12 (codified in scattered sections of 28 U.S.C.).

117. 28 U.S.C. § 1445(a) (2011); see also *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434 (1965) ("Congress, in . . . prohibiting removal of FELA cases to federal courts, has sought to protect the plaintiff's right to bring an FELA action in a state court."). Removal is less of an obstacle in cases raising Article III standing problems because a federal court finding no standing in removed case should remand the case to state court. See Clopton, *Procedural Retrenchment and the States*, *supra* note 31.

118. Although not enforcement claims, it is noteworthy that some of the most aggressive welfare-rights claims arising from the New Deal were adjudicated in state courts. See TANI, *supra* note 8.

119. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

120. For example, it is notable that upon taking control of the House in 2019, the Democratic majority's first bill (H.R. 1) included at least nine severability provisions, which would help

Third, although the Federal Arbitration Act (FAA) was on the books during the New Deal, it was not the behemoth it is today.¹²¹ Thanks to a series of Supreme Court decisions and changes in corporate behavior, arbitration has become a substantial barrier to private enforcement.¹²² Consumer and employment contracts have undercut private enforcement by including waivers of class actions and class arbitration.¹²³ There also has been recent interest in inserting arbitration clauses in corporate bylaws, which would undermine the ability of shareholders to collectively enforce corporate and securities laws.¹²⁴ If Exxon had included such a provision in its bylaws, for example, then it might be able to resist securities class actions alleging that it misled investors about the science of climate change.¹²⁵

Green New Dealers could take on these clauses directly by including prohibitions on arbitration clauses (or class waivers) in new regulatory statutes. The Obama administration, at times, took a sectoral approach to regulating arbitration, and Congress could too.¹²⁶ In addition, if Congress empowered public enforcement, federal or state officials (or their *qui tam* relators) could repair to court even when private parties would be compelled to arbitrate, because those government officials would not be parties to the arbitration agreements.¹²⁷ In my hypothetical about Exxon, suits brought by state attorneys general

maintain the statute against judicial attack. See H. R. 1, 116th Cong. §§ 1931, 2801, 3801, 4801, 5501, 6401, 7501, 8081, 9501 (2019). Meanwhile, Neal Devins and others have observed that the “switch in time” is, in part, explained by the improved drafting of the Second New Deal’s statutes. See Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 250 (1996); see also Michael Nelson, *The President and the Court: Reinterpreting the Courtpacking Episode of 1937*, 103 POL. SCI. Q. 267, 289 (1988). Note, too, that at least some scholars understand the New Deal as being a period of detailed codification that would limit the ability of (hostile) courts to continuing developing common law. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 5 (1982) (“[U]nlike earlier codifications of law, which were so general that common law courts could continue to act pretty much as they always had, the new breed of statutes [in the post-New Deal period] were specific, detailed, and ‘well drafted’” (quoting GRANT GILMORE, *THE AGES OF AMERICAN LAW* 96 (1977))). Cf. Spaulding, *supra* note 3.

121. 9 U.S.C. §§ 1–16 (1990).

122. See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); Glover, *supra* note 10.

123. *Id.*

124. See Zachary D. Clopton & Verity Winship, *A Cooperative Federalism Approach to Shareholder Arbitration*, 128 YALE L.J.F. 169 (2018) [hereinafter Clopton, *A Cooperative Federalism Approach to Shareholder Arbitration*]; Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583 (2016).

125. See CLIMATE CHANGE LITIGATION DATABASES, <http://climatecasechart.com> (last visited Nov. 18, 2019) (collecting *inter alia* securities cases).

126. See, e.g., David L. Noll, *Regulating Arbitration*, 105 CAL. L. REV. 985, 1038–39 (2017).

127. See Clopton, *Procedural Retrenchment and the States*, *supra* note 31; Alexander, *supra* note 110.

would not be implicated by any arbitration clause in Exxon's bylaws because the states were not shareholders.¹²⁸

4. *Trans-Substantive Reforms*

Finally, though not exactly the focus of this Essay, a Green New Deal could incorporate some trans-substantive procedural reforms. Perhaps most obviously, a Green New Deal could be paired with amendments to the FAA.¹²⁹ Critics have argued that the Supreme Court's aggressive interpretations of the FAA have impeded private enforcement and court access.¹³⁰ But like any other federal statute, the FAA could be amended. In addition to FAA reform, Congress could address other questions governed by the Federal Rules of Civil Procedure, or it could take up the institutional design of federal rulemaking itself.¹³¹ These changes would not directly advance the Green New Deal's goals, but they could facilitate the use of civil enforcement to achieve those goals. And perhaps, like the original Rules Enabling Act, Congress's preoccupation with "substantive" issues might give cover to efforts at procedural reform.

CONCLUSION

The Green New Deal seizes on the ambition of the New Deal. But unlike its predecessor, the Green New Deal has not proposed to employ civil enforcement as a tool of public policy. Although New Deal statutes cannot be perfect templates for new legislation, they are valuable models for incorporating civil enforcement into wider efforts at major reform.

This Essay does not call for a Green Fair Labor Standards Act or a Green Securities Exchange Act, but it does suggest that new proposals for environmental or economic reforms could benefit from the experiences of previous eras. Civil enforcement, including a mix of public and private, can be a valuable component of public policy as long as it is designed with care.

128. See, e.g., John Schwartz, *New York Sues Exxon Mobil, Saying It Deceived Shareholders on Climate Change*, N.Y. TIMES (Oct. 24, 2018), <https://www.nytimes.com/2018/10/24/climate/exxon-lawsuit-climate-change.html>.

129. For one example, see H.R. 1423, 116th Cong. (2019), A Bill to Amend Title 9 of the United States Code with Respect to Arbitration ("Forced Arbitration Injustice Repeal Act" or "FAIR Act").

130. See, e.g., Resnik, *supra* note 123; Glover, *supra* note 10.

131. See generally, e.g., Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1 (2018); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2015).

